

Responsible Drilling Alliance
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September 7, 2012

by hand-delivery & first-class mail

Richard J. Allan, Secretary
Department of Conservation and Natural Resources
Rachel Carson State Office Building
P.O. Box 8767
400 Market Street
Harrisburg, PA 17105-8767

Re: Natural Gas Development in the Loyalsock State Forest

Dear Secretary Allan:

Recent seismic testing in the Loyalsock State Forest suggests that the Department of Conservation and Natural Resources ("DCNR") is planning to authorize natural gas development in parts of the Forest where, although the oil and gas rights are in private ownership, DCNR has exclusive control of the surface. We, the undersigned conservation and recreation organizations, respectfully request that DCNR afford the public a meaningful opportunity to participate in DCNR's decision-making concerning gas development in this unique public resource. Before making any final development decisions, DCNR should publish all of its environmental impact studies on such development; hold one or more public meetings on development alternatives; and solicit public comment on any proposed agreements with exploration and production companies. As interpreted in a 1989 Commonwealth Court decision, *Clarence Moore v. Department of Environmental Resources*, 566 A.2d 906 (Pa. Cmwlth. 1989), the deed that gives DCNR surface ownership of more than 25,000 acres of the Loyalsock State Forest also gives DCNR an extraordinary degree of control over the use of most of that acreage. DCNR is legally obligated to exercise this extraordinary control in the best interests of the public. To ascertain those interests, DCNR should engage the public while it considers options for managing the exceptional areas at stake.

BACKGROUND

The Loyalsock State Forest encompasses 114,494 acres in Lycoming County and Sullivan Counties, and secures a wealth of magnificent natural and recreational resources.

The heart of the Forest, spanning parts of five townships in northern Lycoming County, includes the Old Loggers Path, a 27-mile hiking path that follows former lumbering and railway paths; the Devils Elbow Natural Area, a remote plateau of rare plants, bogs and hemlock forests; the Masten Ghost Town; and, perhaps most sublimely, Rock Run, which visitors often describe as the single most beautiful stream in the Commonwealth, and whose watershed the Pennsylvania Department of Environmental Protection classifies as possessing “Exceptional Value.”

During the past year, seismic testing activities have been conducted in various parts of the Forest, including the Rock Run watershed. Reviewing maps on DCNR’s website, we learned that the oil and gas rights under some of the Forest is in private ownership. To determine who owned these rights, and how much acreage was at risk of development, we reviewed Lycoming County land records and several judicial and administrative decisions concerning title to the oil and gas rights. We learned as follows:

- There are 25,621 acres of Loyalsock State Forest where the Commonwealth owns only the surface estate, and does not own oil and gas rights.
- The oil and gas rights under these 25,621 acres were once owned by an individual named Clarence Moore, and are currently owned by Anadarko Exploration and Production Company, LP (“Anadarko”) and International Development Corporation (“IDC”) as tenants in common.
- IDC has leased its interest in the oil and gas rights under the 25,621 acres to Southwestern Energy Production Company.
- The 25,621 acres include two separate areas, one comprising 18,780 acres and the other 6,841 acres. The respective surface use rights of the Commonwealth and Anadarko/IDC are different for each area, as summarized in a 1999 decision of the Pennsylvania Board of Claims, *Estate of Clarence Moore and Pennlyco, Ltd v. Department of Conservation and Natural Resources*, 1999 PA. Bd. Claims LEXIS 6 (Cmwth. Bd. Claims, 1999). That decision refers to the 18,870-acre tract as the “yellow tract” and the 6,841 acre tract as the “blue tract,” reflecting the colors on maps submitted during the case. *Id.* at *1, ¶4. The Board described the parties’ respective ownership and use rights as follows:
 - “[Y]ellow tract: oil and gas is owned by Plaintiffs [predecessors in title to Anadarko/IDC]; surface is owned by Commonwealth; access prior to March 28, 1983 was controlled by Plaintiffs; **access subsequent to March 28, 1983 is controlled by Commonwealth[.]**”
 - “[B]lue tract: oil and gas is owned by Plaintiffs; surface is owned by Commonwealth; access is controlled by Plaintiffs.”

Id. at *7; ¶31 (emphasis added).

- With respect to the 18,870-acre or “yellow” tract, the Board of Claims relied on the decision of the Commonwealth Court in *Clarence Moore v. Department of Environmental Resources*, 566 A.2d 906 (Pa. Cmwlth. 1989). There, construing the deed by which the Commonwealth acquired the surface estate, the Court held that Moore’s right to use the surface to extract oil and gas “expired in March 1983 upon the conclusion of the fifty year term specific in the deed’s own provisions.” *Id.* at 910. In so holding, the Court expressly rejected Moore’s argument that the 50-year limitation applied only to the clause of the deed concerning “the rights of ingress, egress and regress” (to which the court referred as “the easement”). The Court held that the limitation applied with equal force to the subsequent clause governing use of the surface for the purposes of mineral extraction:
- In its 1999 decision, the Board of Claims accurately described the Commonwealth Court’s 1989 decision as having “interpreted [the 1933 deed] to mean that Moore owned the gas and oil underlying the yellow tract but at the end of the fifty (50) years, March 28, 1983, **surface access terminated.**” *Estate of Clarence Moore*, 1999 PA. Bd. Claims LEXIS 6 at *2, ¶8 (emphasis added). The Board of Claims also accurately stated with respect to the “yellow tract” that “access subsequent to March 28, 1983 is controlled by Commonwealth[.]” *Id.* at *7; ¶31.
- When Anadarko and IDC acquired Moore’s oil and gas rights, they stepped into his shoes. As a result, Anadarko and IDC today have no legal right to use the surface of the 18,870-acre yellow tract area to extract oil and gas. Solely by virtue of its deed, the Commonwealth has the right to prevent Anadarko and IDC from using the surface of this tract to extract oil and gas.
- For the 6,841-acre area, the “blue tract,” the chain of title apparently does not contain an express time limitation or other express restriction on the mineral owner’s use of the surface. Given the decision of the Board of Claims in *Estate of Clarence Moore*, access to this area is controlled by Anadarko and IDC, as successors to the plaintiff in that case.

DCNR’S CONSTITUTIONAL AND STATUTORY DUTIES

Under Article I, Section 27 of the Pennsylvania Constitution, DCNR has a legal duty to conserve and maintain State Forest lands for the benefit of all Pennsylvanians, including future generations. The Pennsylvania Conservation and Natural Resources Act, 71 P.S. § 1340.101 *et seq.* (“CNRA”) specifically requires DCNR to protect, maintain and regulate the occupancy and use of State Forest lands. 71 P.S. § 1340.302(a)(3-4). Where the oil and gas under a State Forest area are privately owned but DCNR has exclusive control of the surface (as with the 18,870-acre “yellow tract”), the oil and gas owner may not conduct surface operations unless it obtains a right-of-way from DCNR. Consistent with its Constitutional and statutory duties, DCNR may not grant a right-of-way over such lands unless it ensures that they will be maintained and protected.¹ In this instance, both the Pennsylvania

¹ It may be that Anadarko and IDC will also need rights-of-way across the 18,870-acre tract or other areas where the Commonwealth controls the surface, in order to access portions of the 6,841-acre “blue tract.”

Constitution and the CNRA require that DCNR perform thorough environmental impact studies before granting any rights-of-way for natural gas development in the Loyalsock State Forest.

Under the CNRA, two additional conditions also must be satisfied before DCNR may grant a right-of-way. First, the grant of a right-of-way may not “so adversely affect the land as to interfere with its usual and orderly administration.” 71 P.S. § 1340.302(b)(3). Given the ecological sensitivity and recreational significance of the Loyalsock State Forest, any gas extraction or transmission operations in the Forest would likely run afoul of this restriction, because they would immediately and permanently impair areas containing “Exceptional Value” streams and wetlands.

Second, it must be evident “that the interest of the Commonwealth or its citizens will be promoted by such grant [of a right-of-way].” *Id.* The only way for DCNR to make an informed evaluation of the public interest is to receive input from members of the public who would be affected by gas development in the Forest. Section 302(b)(3) of the CRNA requires, then, that DCNR solicit public input on any proposal to grant rights-of-way for large-scale development in the Forest. Even if the solicitation of public comment is not required under the CRNA, DCNR should still request it. The public resources at stake are the very heart of the Pennsylvania Wilds, and the public’s ecological, recreational, and economic interest in them is simply too important.

For these reasons, we call upon DCNR immediately to publish maps showing the precise location of the 18,870-acre and 6,841-acre parcels in the Loyalsock State Forest; to conduct and then make public environmental impact studies concerning gas development in the Forest; to hold one or more public meetings on development alternatives; and to solicit public comment on any proposed agreements with exploration and production companies.

If you have any questions concerning this matter, please do not hesitate to contact Ralph Kisberg of the Responsible Drilling Alliance or Mark Szybist, Esq. of PennFuture.

Thank you very much for your attention to this matter.

Sincerely,

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DCNR could clarify this issue by posting on its public web site the maps introduced into evidence before the Board of Claims in *Estate of Clarence Moore and Pennlyco, Ltd v. Department of Conservation and Natural Resources*, 1999 PA. Bd. Claims LEXIS 6 (Cmwlth. Bd. Claims, 1999), at *1, ¶4.

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